

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHARLOTTE MCKIMMY,

Plaintiff,

v.

JOANNE B. BARNHART,

Defendant.

No. CV-04-3052-FVS

ORDER

THIS MATTER comes before the Court on cross motions for summary judgement by the plaintiff, Ct. Rec. 12, and the defendant, Ct. Rec. 18. Ms. McKimmy is represented by D. James Tree. Ms. Barnhart, Commissioner of the Social Security Administration, is represented by Assistant United States Attorney Pamela DeRusha and Special Assistant United States Attorney David Blume.

I. JURISDICTION

Ms. McKimmy protectively filed Social Security Insurance and Disability Insurance Benefits applications on October 15, 2001. (Tr. 200.) The plaintiff alleged that she had an onset date of January 1, 2000. (Id.) Her application was denied initially, Tr. 176-179, and on reconsideration, Tr. 181-183. After timely requesting a hearing, the plaintiff appeared before Administrative Law Judge ("ALJ") Verrell Dethloff on April 22, 2003. (Tr. 360-75.) The ALJ issued a decision on August 29, 2003, finding that the plaintiff was not disabled and denying her claim. (Tr. 19-32.) The Appeals Council

1 denied review, making the ALJ's decision the final decision of the
2 Commissioner. (Tr. 9-11.) The instant matter is before the district
3 court pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

4 II. SEQUENTIAL EVALUATION PROCESS

5 The Social Security Act defines disability as the "inability to
6 engage in any substantial gainful activity by reason of any medically
7 determinable physical or mental impairment which can be expected to
8 result in death or which has lasted or can be expected to last for a
9 continuous period of not less than twelve months." 42 U.S.C. §§
10 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a claimant
11 shall be determined to be under a disability only if her impairments
12 are of such severity that the claimant is not only unable to do her
13 previous work but cannot, considering claimant's age, education and
14 work experiences, engage in any other substantial gainful work which
15 exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
16 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential
18 evaluation process for determining whether a person is disabled. 20
19 C.F.R. §§ 404.1520, 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42
20 (1987).¹

21 Step 1: Is the claimant engaged in substantial gainful

22
23 ¹ Certain sections of 20 C.F.R. addressing Title II and
24 Title XVI benefits were recently amended. 68 F.R. 51153. The
25 amendments are applicable to administrative decisions dated on or
26 after September 25, 2003. 68 F.R. 51159. Accordingly, the
amendments are not applicable here. Any reference to C.F.R.
sections in this opinion is pre-amendment pending publication of
the amendments in April 2004.

1 activities? 20 C.F.R. §§ 404.1520(b), 416.920(b). If she is,
2 benefits are denied. If she is not, the decision maker proceeds to
3 step two.

4 Step 2: Does the claimant have a medically severe impairment or
5 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c).
6 If the claimant does not have a severe impairment or combination of
7 impairments, the disability claim is denied. If the impairment is
8 severe, the evaluation proceeds to the third step.

9 Step 3: Does the claimant's impairment meet or equal one of the
10 listed impairments acknowledged by the Commissioner to be so severe
11 as to preclude substantial gainful activity? 20 C.F.R. §§
12 404.1520(d), 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the
13 impairment meets or equals one of the listed impairments, the
14 claimant is conclusively presumed to be disabled. If the impairment
15 is not one conclusively presumed to be disabling, the evaluation
16 proceeds to the fourth step.

17 Step 4: Does the impairment prevent the claimant from performing
18 work she has performed in the past? 20 C.F.R. §§ 404.1520(e),
19 416.920(e). If the claimant is able to perform her previous work,
20 she is not disabled. If the claimant cannot perform this work,
21 proceed to the fifth and final step.

22 Step 5: Is the claimant able to perform other work in the
23 national economy in view of her age, education and work experience?
24 If the claimant is able to perform other work in the national
25 economy, then she is not disabled. 20 C.F.R. §§ 404.1520(f),
26 416.920(f).

1 The initial burden of proof rests upon the plaintiff to
2 establish a prima facie case of entitlement to disability benefits.
3 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971). This burden
4 is met once a claimant establishes that a physical or mental
5 impairment prevents her from engaging in her previous occupation. At
6 step five, the burden shifts to the Commissioner to show that the
7 claimant can perform other substantial gainful activity and a
8 "significant number of jobs exist in the national economy" which
9 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.
10 1984).

11 **III. STANDARD OF REVIEW**

12 "The [Commissioner's] determination that a claimant is not
13 disabled will be upheld if the findings of fact are supported by
14 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
15 Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more
16 than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
17 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister v.*
18 *Sullivan*, 888 F.2d 599, 601-02 (9th Cir. 1989). "It means such
19 relevant evidence as a reasonable mind might accept as adequate to
20 support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401
21 (1971) (citations omitted). "[S]uch inferences and conclusions as
22 the [Commissioner] may reasonably draw from the evidence" will also
23 be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
24 On review, the court considers the record as a whole, not just the
25 evidence supporting the decision of the Commissioner. *Weetman v.*
26 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*,

1 648 F.2d 525, 526 (9th Cir. 1980)). We cannot affirm the
2 Commissioner's decision simply by isolating a specific quantum of
3 supporting evidence, *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th
4 Cir.1999); however, if the evidence supports more than one rational
5 interpretation, the court must uphold the decision of the ALJ. *Allen*
6 *v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). A decision supported
7 by substantial evidence will still be set aside if the proper legal
8 standards were not applied in weighing the evidence and making the
9 decision. *Browner v. Secretary of Health and Human Serv.*, 839 F.2d
10 432, 433 (9th Cir. 1987).

11 **IV. STATEMENT OF FACTS**

12 The facts have been presented in the administrative transcript
13 and will only be summarized here. At the time the ALJ issued his
14 decision, the plaintiff was 45 years old. (Tr. 20.) She has a high
15 school education and some college education. (Tr. 216.) Her past
16 relevant work was as a waitress. (Tr. 29.) Plaintiff alleges that
17 she has been disabled since January 1, 2000, due to hepatitis C,
18 cellulitis of her legs, abdominal pain, fatigue, arthritis of her
19 knee and back, and kidney problems. (Tr. 20.)

20 **V. COMMISSIONER'S FINDINGS**

21 At Step One, the ALJ found that the plaintiff had not
22 engaged in substantial gainful activity since the onset of her
23 disability. (Tr. 21.) At Step Two, the ALJ found that the
24 plaintiff's hepatitis C and drug addiction were severe impairments.
25 Id. At Step Three, the ALJ found that the plaintiff's impairments,
26 alone and in combination, did not meet or equal any of the

1 impairments described in the listing of impairments. Id. The ALJ
2 determined that the plaintiff retained the residual functional
3 capacity to perform sedentary work not requiring lifting and carrying
4 of more than 20 pounds occasionally and 10 pounds frequently, sitting
5 more than six hours in an eight-hour day and standing and/or walking
6 more than two hours in an eight-hour day. (Tr. 22.) Proceeding to
7 Step Four, the ALJ found that the plaintiff was unable to perform her
8 past relevant work. (Tr. 29.) At Step Five, however, the ALJ
9 determined that the plaintiff could perform the demands of jobs
10 fitting into the category of sedentary work. (Tr. 30.) Accordingly,
11 the ALJ determined that the plaintiff was not disabled within the
12 definition of the Social Security Act. Id.; 20 C.F.R. §§
13 404.1520(f), 416.920(f).

14 VI. ISSUES

15 The plaintiff contends that the Commissioner's findings are
16 tainted by legal error and not supported by substantial evidence.
17 The plaintiff argues that the Commissioner's decision was in error
18 because:

- 19 1. The ALJ failed to conduct an adequate drug and alcohol
20 abuse ("DAA") evaluation;
- 21 2. The ALJ failed to fully and fairly develop the record
22 regarding the plaintiff's mental impairments;
- 23 3. The ALJ improperly rejected the opinion of the plaintiff's
24 treating physician;
- 25 4. The ALJ failed to provide adequate reasons for rejecting
26 the testimony of lay witnesses; and

1 5. The ALJ, in assessing Step Five, failed to call a
2 vocational expert despite the plaintiff's non-exertional
3 limitations.

4 Ct. Rec. 13 at 8.

5 The Court must uphold the Commissioner's determination that the
6 claimant is not disabled if the Commissioner applied the proper legal
7 standards and there is substantial evidence in the record as a whole
8 to support the decision.

9 **DISCUSSION**

10 **A. ADEQUACY OF THE DAA EVALUATION**

11 The plaintiff alleges that the ALJ erred in evaluating her claim
12 for disability because he did not make a proper evaluation of the
13 effects of her drug abuse. It is well settled in this Circuit that
14 an ALJ must conduct the five-step inquiry without attempting to
15 determine the impact of alcoholism or drug addiction. *Bustamante v.*
16 *Massanari*, 262 F.3d 949, 955 (9th Cir. 2001). If the ALJ finds
17 that the claimant is not disabled under the five-step inquiry, the
18 claimant is not entitled to benefits and there is no need to proceed
19 with further analysis. *Id.* If the ALJ finds that claimant is
20 disabled, and there is evidence of substance abuse, the ALJ should
21 proceed under §§ 404.1535 or 416.935 to determine if the claimant
22 would still be disabled absent the substance abuse. *Id.*

23 In the case at bar, the record does not indicate that the ALJ
24 prematurely separated out the impact of the plaintiff's substance
25 abuse. The record does indicate that the ALJ considered the
26 plaintiff's substance abuse in determining that she was limited to

1 sedentary work, but this consideration was taken in conjunction with
2 evidence from the record as a whole, including the plaintiff's own
3 testimony. (Tr. 24-29.) After determining the plaintiff's residual
4 functional capacity to engage in sedentary work, the ALJ went on to
5 analyze her ability to do her past relevant work and whether jobs
6 were available in the national economy. This was not a legal error.

7 In this same context, the plaintiff argues that the ALJ erred in
8 discounting her fatigue, because it was not clear whether the fatigue
9 was caused by drug abuse or other impairments. At Step Three, the
10 ALJ found that the plaintiff's impairments individually and in
11 combination did not meet the criteria of any the listed impairments.
12 The record indicates that the plaintiff was able to care for her own
13 needs, babysit her grandchild, and do light household work. (Tr.
14 27.) The ALJ indicates that it is not possible to determine the
15 extent of the plaintiff's fatigue and weakness until her drug use
16 ceases, but even without cessation of use, there is substantial
17 evidence that the plaintiff's fatigue does not rise to the level of
18 rendering her disabled.

19 The plaintiff's arguments as to this issue do not support remand
20 of this case for reconsideration.

21 **B. RECORD AS TO THE PLAINTIFF'S MENTAL IMPAIRMENTS**

22 The plaintiff alleges that the ALJ erred because he did not
23 fully develop the record as to the plaintiff's mental impairments.
24 The plaintiff argues that the ALJ should have ordered an evaluation
25 of what effect the plaintiff's drug abuse might have on her other
26 impairments or should have allowed evidence to be gathered regarding

1 the plaintiff's mental impairments separate from her drug abuse.

2 While the Commissioner is given great discretion in determining
3 whether or not to call for an consultative examination, such an
4 examination may be necessary where additional evidence is needed,
5 which is not contained in the claimant's records or the evidence
6 contained in the records is ambiguous or insufficient. 20 C.F.R. §§
7 404.1519a(b)(1), (4), 416.919a(b)(1), (4). A consultative exam may
8 also be ordered when the examination is necessary in order to make a
9 disability determination. *Reed v. Massanari*, 270 F.3d 838, 842 (9th
10 Cir. 2001) (citing *Brock v. Chater*, 84 F.3d 726, 728 (5th Cir. 1996)).
11 Here, the ALJ indicated that a consultative examination was not
12 necessary. (Tr. 27.) The ALJ stated that the plaintiff's testimony
13 of past abuse was not supported by evidence which would form the
14 basis for having such as examination done. (Id.) There is
15 substantial evidence in the record to support the ALJ's finding that
16 a consultative examination was not necessary. This includes the
17 information provided by the plaintiff's treating physician, testimony
18 of the medical expert, and the plaintiff's testimony, which the ALJ
19 found to be credible to only a limited extent. The ALJ did not err
20 in refusing the plaintiff's request for a consultative examination
21 and this argument does not form the basis for remand.

22 **C. REJECTION OF TREATING PHYSICIAN'S OPINION**

23 The plaintiff alleges that the ALJ erred because he improperly
24 rejected the opinion of her treating physician. The plaintiff argues
25 that the ALJ did not provide a sufficient basis for rejecting Dr.
26 Martinez's opinion regarding the plaintiff's fatigue, anxiety, and

1 depression. A treating physician's opinion carries more weight than
2 an examining physician's, and an examining physician's opinion
3 carries more weight than a reviewing or consulting physician's
4 opinion. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996).

5 In a disability proceeding, the treating physician's opinion is
6 given special weight because he is employed to cure and has a greater
7 opportunity to observe the claimant's physical condition. *Fair v.*
8 *Bowen*, 885 F.2d 597, 604-05 (9th Cir. 1989); *Murray v. Heckler*, 722
9 F.2d 499, 502 (9th Cir. 1983). If the treating physician's opinions
10 are not contradicted, they can be rejected only with clear and
11 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
12 ALJ may reject the opinion if he states specific, legitimate reasons
13 that are supported by substantial evidence. *Flaten v. Secretary of*
14 *Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995); *Fair*, 885
15 F.2d at 605. The treating physician's uncontradicted opinion on the
16 ultimate issue of disability must itself be credited unless it can be
17 rejected for clear and convincing reasons. *Holohan v. Massanari*, 246
18 F.3d 1195, 1202-03 (9th Cir. 2001)(citation omitted).

19 The plaintiff's argument that the opinion of her treating
20 physician was improperly rejected is not supported by evidence in the
21 record. A reading of the ALJ's opinion indicates that he gave
22 significant weight to Dr. Martinez's opinion that the plaintiff could
23 perform sedentary work. (Tr. 23 (citing Exhibit 10F).) Dr. Martinez
24 indicated that the plaintiff's ability to do sedentary work was a
25 result of her hepatitis C, fatigue and knee pain, but indicated that
26 if the plaintiff stayed clean and sober, she could return to work as

1 a waitress. (Id. at 24 (citing Exhibit 10F).) There is nothing in
2 the record to indicate that the ALJ's determination contradicted Dr.
3 Martinez's opinion. Instead, every indication is that her opinion
4 about the extent of the plaintiff's conditions and the effect of
5 these conditions on her ability to work was taken into account. The
6 plaintiff's argument as to this issue does not form the basis for
7 remand.

8 **D. REJECTION OF LAY WITNESS TESTIMONY**

9 The plaintiff argues that the ALJ erred because he rejected lay
10 witness testimony without providing an adequate basis for the
11 rejection. "Lay testimony to a claimant's symptoms is competent
12 evidence that an ALJ must take into account, unless he or she
13 expressly determines to disregard such testimony and gives reasons
14 germane to each witness for doing so." *Lewis v. Apfel*, 236 F.3d 503,
15 511 (9th Cir. 2001). The fact that lay testimony conflicts with
16 medical evidence is an adequate basis for disregarding lay testimony.
17 *Id.* (citing *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984)).
18

19 Here, the plaintiff's neighbor, James Emmons, observed that the
20 plaintiff could only move around for a couple hours at a time, often
21 had to take naps, could walk up to two miles unassisted, couldn't
22 carry over ten pounds for long periods of time, and has slurred
23 speech when she is tired. (Tr. 63-64.) The ALJ disregarded Mr.
24 Emmons testimony. He stated, "I am unable to credit this lay
25 witness' statements in this matter as probative in terms of the
26 ultimate issue of disability in light the medical and other factors
of this case." (Tr. 27.) The ALJ went on to conclude "that the lay

1 testimony in this case cannot outweigh my analysis of the objective
2 clinical and laboratory evidence, and medical opinion of record, and
3 of claimant's own credibility." (Tr. 29.) A reading of the ALJ's
4 opinion does not indicate that Mr. Emmons' statements were
5 discredited because of inconsistencies with medical evidence.
6 Instead, the record indicates that even with the information provided
7 by Mr. Emmons' statements, the plaintiff did not meet her burden of
8 proving disability. (Tr. 29.) The ALJ did not commit legal error in
9 giving Mr. Emmons' statements less weight than the medical evidence.
10 This argument does not form the basis for remand.

11 **E. FAILURE TO CALL VOCATIONAL EXPERT**

12 The plaintiff alleges that the ALJ erred in not calling a
13 vocational expert when both exertional and non-exertional limitations
14 were alleged. The fact that a claimant presents with both exertional
15 and non-exertional limitations does not preclude application of the
16 grids in determining disability. *Bates v. Sullivan*, 894 F.2d 1059,
17 1063 (9th Cir. 1990), *overruled on other grounds*, *Bunnell v.*
18 *Sullivan*, 947 F.2d 341, 342 (9th Cir. 1991) (en banc). "[T]he grids
19 may be used to find a claimant not disabled when the ALJ finds that
20 the claimant's non-exertional limitations do not significantly affect
21 his exertional capabilities. *Id.* (citing *Razey v. Heckler*, 785 F.2d
22 1426, 1430 (9th Cir. 1986), *modified*, 794 F.2d 1348 (9th Cir. 1986).
23 Alternatively, "where a claimant's non-exertional limitations *do*
24 significantly limit his range of work, then use of the grids to find
25 him not disabled is inappropriate." *Id.* (citing *Polny v. Bowen*, 864
26 F.2d 661, 663-64 (9th Cir. 1988)).

1 Here, the ALJ determined that the plaintiff could fully perform
2 all of demands of jobs within the category of sedentary work. (Tr.
3 30.) Review of the record as a whole, including the plaintiff's
4 testimony, lay testimony, and medical evidence does not seem to
5 indicate that any non-exertional limitations from which the plaintiff
6 may suffer, rise to the level of significantly affecting her ability
7 to carry out those jobs within the classification of sedentary work.
8 It was appropriate for the ALJ to look to the grids in making his
9 disability determination. This argument does not form the basis for
10 remand.

11 **CONCLUSION:**

12 Having reviewed the record as a whole, the Court determines that
13 there is substantial evidence to support the ALJ's determination that
14 the plaintiff is not disabled. The ALJ did not apply improper legal
15 standards in reaching his decision. Accordingly,
16

17 **IT IS HEREBY ORDERED** that Ms. Barnhart's Motion for Summary
18 Judgment, Ct. Rec. 18, be **GRANTED**.

19 **IT IS SO ORDERED.** The District Court Executive is hereby
20 directed to enter this order and furnish copies to counsel.

21 **DATED** this 4th day of August, 2005.

22 s/ Fred Van Sickle

23 Fred Van Sickle

24 United States District Judge
25
26